FEB 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 746

SOLOMON S. LEVADI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Petitioner Solomon S. Levadi prays that a writ of certiorari issue herein to review the judgment of the United States Court of Claims entered in the above cause on December 5, 1956.

THE MAJORITY AND DISSENTING OPINIONS BELOW.

The opinion of the United States Court of Claims was filed December 5, 1956. It is as yet unreported in the official volumes of the Court of Claims. A copy of the opinion is appended hereto as Appendix A. This includes the dissenting opinion filed by two of the judges of the Court of Claims.

THE JURISDICTION OF THIS COURT.

The judgment of the Court of Claims herein sought to be reviewed was entered December 5, 1956.

The jurisdiction of the United States Supreme Court is sought to be invoked under Title 28 U. S. Code, Sec. 1255 (1).

QUESTION PRESENTED.

The question presented is whether the claim of a reserve officer in the United States Army for disability retirement pay is barred by the statute of limitations.

However, the fundamental and underlying question is whether the majority opinion of the Court of Claims has exceeded its basic jurisdiction in application of the statute of limitations.

STATUTES INVOLVED.

The statutes involved are:

a. The statute creating the Court of Claims, Title 28 U. S. Code, Sec. 1491.

b. The statute of limitations as to filing of petitions in the Court of Claims, Title 28 U. S. Code, Sec. 2501.

These statutes are both printed in full in Appendix B.

STATEMENT OF THE CASE.

Petitioner was commissioned as a reserve officer in the United States Army on June 19, 1930. In January, 1942, he entered active duty as a dentist and oral surgeon. In 1942, he went overseas to the Pacific area; after complete physical examinations. Beginning with the fall of 1942, petitioner suffered various illnesses. In September, 1942, he developed arthritis. He was returned to the United States and was hospitalized because of this ailment for

about five months in 1945. Petitioner became permanently incapacitated for military service as of June 1, 1945 because of arthritis of the spine. Since that time he has suffered from intermittent and disabling attacks of this disease; as well as from pericarditis.

On October 2, 1945, an Army Disposition Board found petitioner incapacitated for military duty as of June 1, 1945. On November 1, 1945, an Army Retiring Board affirmed these findings based on chronic arthritis. However, the Surgeon General of the United States requested reconsideration. On December 13, 1945, a different Army Retiring Board found petitioner was incapacitated but that the condition was not the result of army service. On February 16, 1946, petitioner was separated from army service. On February 21, 1946, the Secretary of War disapproved the previous finding and held petitioner qualified for general military duty.

The decision was reviewed by a Disability Review Board which found, on December 13, 1946, that petitioner was not incapacitated. On January 23, 1947, this finding was affirmed by the Secretary of War. In April, 1953, petitioner made application to the Disability Review Board for rehearing but this was denied on June 23, 1953. On June 26, 1953, petitioner made application to the Army Board for Correction of Military Records. This was denied on January 11, 1954.

On November 18, 1955, petitioner filed his petition in the Court of Claims. The jurisdiction of the Court of Claims was invoked under Title 28 U. S. Code, Sec. 1491 (2) for a claim against the United States founded upon an Act of Congress. The petition alleged that all of the administrative rulings were arbitrary, capricious, contrary to law and army regulations and contrary to fact and that petitioner had a valid claim against the United States for disability

retirement pay. On April 23, 1956, defendant filed a written motion to dismiss the petition on the sole ground that it was barred by the statute of limitations.

The statute provides that every claim over which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed "within six years after such claim first accrues" (Title 28 U. S. Code, Sec. 2501. Appendix B). Written briefs were filed by both sides with reference to the motion to dismiss. The majority of the Court of Claims sustained the motion.

The majority held that petitioner's cause of action accrued when the wrong was done. That is, petitioner's cause of action in the Court of Claims accrued when the Secretary of War held on January 23, 1947 that petitioner was not entitled to retirement pay. The majority held that petitioner's rights depended upon favorable action of a board or agency; that the petition in effect was an action to set aside an allegedly erroneous action of the board or agency; therefore that the petition should have been filed within six years after the adverse ruling by the Secretary of War.

Two judges of the Court of Claims dissented. They held that petitioner's action in the Court of Claims was not basically an effort to set aside the order of the Secretary of War. This would not be within the jurisdiction of the Court of Claims. Petitioner's claim is based upon a statute, is a claim for money judgment agaginst the United States, and is the only type of claim which the Court had power to decide. Therefore, the alleged arbitrary action of the Secretary has no chronological or other bearing upon the bar of limitations. Hence, although petitioner might not be entitled to recover all installments of retirement pay due him since his discharge in 1946, he was entitled to

recover those installments which were unpaid within the six years prior to the filing of the petition plus future installments which accrued to the date of judgment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

This record presents a basic and fundamental issue as to the jurisdiction of the Court of Claims. The majority opinion conceives of the Court of Claims as a court of general jurisdiction. They reason that petitioner is seeking to set aside an allegedly erroneous and arbitrary decision of an administrative officer. Therefore, the limitation period begins to run from the date of the decision. On the contrary, the minority opinion reasons that petitioner sues only to enforce a money demand against the United States. The Court of Claims cannot set aside the allegedly arbitrary decision which denied this claim but it may disregard the decision and pass upon the merits of the claim.

Petitioner contends that the opinion of the majority is contrary to law and far afield from the basic concept of the nature and jurisdiction of the Court of Claims. The Court of Claims is an agency created by Congress for the purpose of assisting in orderly payment of debts of the United States. The Court is not a constitutional court. The statute creating it provides that the Court shall have jurisdiction to render judgment upon any claim against the United States (Title 28 U. S. C. Sec. 1491). This does not mean that the Court of Claims is created as a court of general jurisdiction. It means that its jurisdiction is strictly and only limited to the rendering of money judgments on claims against the United States.

This has traditionally been the jurisdiction of the Court of Claims at all times since its inception. As long ago as 1867, this Court held that the Court of Claims had jurisdiction only over "cases in which the petitioner sets up

a moneyed demand as due from the government" (*United States* v. *Alire*, 73 U. S. 573, 576).

Other cases decided by this Court have delimited the jurisdiction of the Court of Claims in identical manner. This Court has invariably held that the Court of Claims is a legislative and not a constitutional court and that its jurisdiction is strictly and only confined to the rendition of money judgments in suits brought for that relief against the United States.

In the case of *United States* v. *Sherwood*, 312 U. S. 584, 61 S. Ct. 767, 85 L. Ed. 1058, this Court, in describing the jurisdiction of the Court of Claims held as follows (312 U. S. at pages 587, 588):

> "The Court of Claims is a legislative, not a constitutional court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power 'to pay the debts * * * of the United States,' which it is free to exercise through judicial as well as non-judicial agencies. See *Williams* v. *United States*, 289 U. S. 553, 569, 579; *Ex parte Bakelite Corporation*, 279 U. S. 438, 452, *et seq.* It is for this reason, and because of the power of the sovereign to attach conditions to its consent to be sued, that Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims. *McElrath* v. *United States*, 102 U. S. 426; *Williams* v. *United States, supra*, 570, 571; *Ex parte Bakelite Corporation, supra*, 453.
>
> "Except as Congress has consented there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States, or for the review of its decisions by appellate courts. *Luckenbach Steamship Co.* v. *United States*, 272 U. S. 533, 536, *et seq.* For that reason it has been uniformly held, upon a review of the statutes creating the court and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States,

United States v. *Alire,* 6 Wall. 573; *United States* v. *Jones,* 131 U. S. 1, and if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court, *United States* v. *Jones, supra; Lynn* v. *United States,* 110 F. 2d 586, 588; *Leather & Leigh* v. *United States,* 61 Ct. Cls. 388, or if its maintenance against private parties is prerequisite to prosecution of the suit against the United States the suit must be dismissed. *Jackson* v. *United States,* 27 Ct. Cls. 74, 84; *Waite* v. *United States,* 57 Ct. Cls. 546; *Leather & Leigh* v. *United States, supra;* cf. *Turner* v. *United States,* 248 U. S. 354; *Green* v. *Menominee Tribe,* 233 U. S. 558. See *Pacific Mutual Life Insurance Co.* v. *United States,* 44 F. 2d 887, 888."

As another example, this Court has held that the Court of Claims has jurisdiction only to render a money judgment against the United States so that it had no jurisdiction to remand a rate fixing order to the Interstate Commerce Commission for further consideration (*United States* v. *Jones,* 336 U. S. 641, 670; 69 S. Ct. 787, 802). Also, the Court of Claims itself has not hesitated to state the limits of its own jurisdiction and it has held specifically that its power is confined to cases involving money demands against the United States (*Hart* v. *United States,* 91 C. Cls. 308 also *Gaines* v. *United States,* 132 C. Cls. 408, 131 F. Supp. 925).

It follows of necessity that petitioner did not seek and could not obtain in the Court of Claims direct review of the order of the Secretary of War. The Secretary of War is not a party to the proceedings. If he were, the Court of Claims would have no jurisdiction, as above pointed out by this Court. The essence of the petition is and can only be a claim for money judgment on a money demand against the United States of America.

Thus it appears that the majority opinion of the Court of Claims, which calculates the bar of the statute of limi-

tations from the date of the administrative order, is based upon a total misconception of the jurisdiction of the Court of Claims. The administrative order of the Secretary of War did not create petitioner's cause of action cognizable in the Court of Claims. The right claimed by petitioner is entirely and only a statutory right to disability retirement pay. The entire matter of the right to disability pay is based upon and determined by the statute (Title 38 U. S. Code Chap. 11-c). The statute sets up elaborate provisions for review of orders of discharge or dismissal but does not provide for review of administrative orders by the Court of Claims. The veteran has a right to a hearing before a Board of Review (Title 38 U. S. Code Sec. 693 h) and by a Disability Review Board (Title 38 U. S. Code Sec. 693 i).

Also, as a matter of policy, it is important to note that both of these statutes provide that the veteran's request for review thereunder must be filed within fifteen years after the date of retirement and disability or after June 22, 1944, whichever is later. This clearly indicates the policy of Congress to give veterans at least until June 22, 1959 for obtaining administrative review of matters involving disability retirement pay.

Petitioner's claim, therefore, is based upon a statute. His claim to retirement pay renews itself each month throughout his entire life after his separation from army service as additional monthly installments of retirement pay accrue. His suit in the Court of Claims is a money demand for payment of these installments. The ruling of the Secretary of War certainly does not represent the date upon which petitioner's continuing claim "first accrues" under the limitation statute. As the minority of the Court of Claims held, petitioner is entitled to recover "all installments which fall due and were unpaid within the

six years prior to the filing of the petition, plus any pay accruing and unpaid after the petition was filed up to the date judgment is entered". Petitioners' only remaining remedy is in exercise of the supervisory powers of the Supreme Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF CLAIMS.

IN THE UNITED STATES COURT OF CLAIMS.

No. 431-55

(Decided December 5, 1956)

SOLOMON S. LEVADI *vs.* THE UNITED STATES.

Mr. Meyer Goldberg for plaintiff. *Mr. Leonard L. Levin* was on the brief.

Mr. John R. Franklin, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant.

ON DEFENDANT'S MOTION TO DISMISS.

WHITAKER, *Judge*, delivered the opinion of the court:

This is another case involving the proper application of the statute of limitations to the claim of an Army officer, who claims that he had been erroneously denied the right to retirement for physical disability and, therefore, to retired pay.

This question has been heretofore considered by the court in several recent cases, to wit: *Rosnick* v. *United States*, 132 C. Cls. 1, and the following three cases, all decided on November 8, 1955; *Girault* v. *United States*, No. 50474; *Duff* v. *United States*, No. 194-55; *Odell* v.

United States, No. 145-55; and more recently in *Levine* v. *United States,* No. 482-54, decided January 31, 1956, and *MacFarlane* v. *United States,* No. 294-55, decided April 3, 1956. In all of these cases it was held that plaintiff's cause of action accrued when the Secretary of War approved the action of the Retiring Board denying plaintiff the right of retirement with pay by reason of physical disability, and that it was barred if not brought within six years thereafter.

These cases are determinative of the issue presented in the case at bar, but we have a short further comment to make on the question.

It is of course fundamental that a cause of action accrues at the moment the alleged wrong is done the plaintiff, and that the statute begins to run at that time. This wrong was done plaintiff, if at all, when his claim to retired pay on account of permanent physical disability was disallowed.

Plaintiff asserted that he was permanently incapacitated for further military service and that he was entitled to be retired for physical disability and to receive the retired pay provided for by law. The Secretary of War replied, you are not permanently disabled and you are not entitled to retired pay and none will be paid to you. At that moment plaintiff's right of action accrued.

In the case at bar, the Army Retiring Board, before which plaintiff appeared, at first held that plaintiff was permanently incapacitated for active service "because of chronic arthritis of the spine of minimal degree," and that his incapacity was an incident of his service. The Surgeon General returned the case to the Board, because he said that arthritis of a minimal degree did not incapacitate a person for military service.

Upon reconsideration, the Army Retiring Board per-

sisted in its conclusion that plaintiff was permanently incapacitated, but changed its mind as to the date of inception of the incapacity, and held that the incapacity had existed prior to his army service and, therefore, that it was not an incident of the service.

Quite naturally the Secretary of War disapproved of this finding of the Army Retiring Board. He determined, instead, that plaintiff was qualified for general military duty, but, according to the petition, he stated that plaintiff would not be recalled to active duty. Under this holding plaintiff was not entitled to retired pay and would not be entitled to active duty pay, unless he was later recalled to active duty. If the plaintiff was in fact qualified for general military duty, it was within the discretion of the Secretary to recall him to active duty or not, plaintiff being a reserve officer.

But plaintiff says he was not qualified for active duty and that the ruling of the Secretary of the Army to the contrary was erroneous, and that by reason of this erroneous ruling he was deprived of the retired pay to which he was entitled.

So long as that ruling stood, plaintiff had no right to retired pay, because the statutes vest in the Army Retiring Boards and the Secretary of War the right to determine whether or not an officer is entitled to be retired for physical disability. In order for plaintiff to receive retired pay, that ruling had to be set aside.

The statutes give plaintiff six years within which to do this. If he fails to commence an action to set it aside within that time, he is barred from doing so later. The statutes defining the jurisdiction of this court leave us powerless to set aside that allegedly erroneous ruling, unless plaintiff had instituted an action to do so within the six-year period.

So long as the ruling stands, plaintiff is not entitled to retired pay.

Cases such as this are entirely different from those where a plaintiff's right is given him by statute, independent of any action of a board or agency. In such case plaintiff can assert his statutory right to all pay accruing to him under the statute within six years prior to the filing of his petition, as this court has frequently held. But not so where his right is dependent upon the action of a board or agency. If he presents his case to a board or agency, and that board or agency denies him the right to which he thinks he is entitled, then he must take action within six years to set aside its action.

So far as we know, there is no case in which this court has ever held to the contrary. We have many times held that where a right is given by statute, independent of the action of a board or agency, suit may be brought at any time for all benefits accruing under the statute within six years; but, where the right asserted is dependent upon favorable action of a board or agency, we have never held that a suit to set aside an allegedly erroneous action of such board or agency may be instituted after the lapse of six years.

Plaintiff's right to retired pay is dependent upon favorable action of the retiring board and the approval of such action by the Secretary of War. That action was taken more than six years before the petition was filed.

Defendant's motion to dismiss will be granted and plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge;* and JONES, *Chief Judge,* concur.

LITTLETON, *Judge,* and MADDEN, *Judge,* dissenting:

We cannot agree with the majority that plaintiff's entire claim must be dismissed as barred by the statute of limitations. The majority holds that a cause of action for disability retired pay accrues, if at all, when the Secretary of the service concerned approves the action of the retiring board denying plaintiff the right of retirement with pay because of service incurred disability. The majority reasons that where a right to disability retired pay is given by statute independent of the action of any board or agency, a suit may be brought at any time for all benefits accruing under the statute within six years of the filing of the petition in this court, but that where the right to such pay is "dependent upon favorable action of a board or agency", this court has never held that a suit "to set aside an allegedly erroneous action of such board or agency" might be instituted after the lapse of six years from such alleged erroneous action. In the instant case the majority concludes that because the plaintiff's right to disability retired pay is dependent upon favorable action of a retiring board and also upon the approval of that action by the Secretary of War, the petition filed more than six years after unfavorable retiring board action and approval by the Secretary, is not timely.

We cannot agree with the above analysis for several reasons. First, when an officer of one of the armed services believes he has been wrongfully denied disability retirement with disability retirement pay which an Act of Congress provides he shall have under circumstances which he believes apply to his case, he has two rights: one is to have wrongful or erroneous action of the board or Secretary set aside, and the other is to seek the disability retired pay denied him as a result of such wrongful action. The first right, that of having the erroneous ac-

tion set aside, is one of which this court has no jurisdiction, such relief being in the jurisdiction of the District Court. Jurisdiction in this court is limited to the granting of money judgments on claims founded upon the Constitution, acts of Congress, regulations of Executive departments, express or implied contracts with the United States, and for unliquidated damages in claims not sounding in tort. 28 U. S. C. 1491. A suit to recover disability retired pay, which is the only one this plaintiff may bring in this court, is essentially a suit founded upon a statute and is not one founded upon board or agency action.

It is true that the statute says that when the board finds that an officer is incapacitated for active service, etc. (10 U. S. C. § 934) and its decision is approved by the President, the officer shall be retired from active service. Other provisions require the granting of disability retired pay. However, we do not think that the purpose of the statute to grant disability retirement with pay may be defeated by an arbitrary refusal to consider a proper case or, after considering it, to arbitrarily refuse to grant retirement with pay. The right to pay is statutory and in order to determine whether a plaintiff has a claim under the statute, it is, of course, necessary to determine whether the action of the board or Secretary in denying the retired pay is or is not in accordance with the meaning and purpose of the statute. If this court decides that the action is illegal, it has no power *to set that action aside,* but it does have the power to grant part of the relief to which the aggrieved person is entitled under the statute, and that relief is to permit recovery of the pay the aggrieved person would have received had the board and the Secretary acted in accordance with Congressional mandate.

When this court grants recovery on a claim for pay under a pay statute, whether it be retired pay or active duty pay, or civil service pay, it must hold, for the purpose

of rendering a judgment, that the action of the Government agency in denying such pay was contrary to the statute and illegal. The action which results in the denial of pay is usually a decision of a board or of an agency head erroneously declaring that the plaintiff's status is such that he is not entitled to the pay sought. The claim in this court, founded upon the applicable statute, to recover pay, *arises as a result of such illegal or arbitrary decision,* but the claim for pay granted by the statute *accrues* for the purposes of a suit to recover such pay, only at the time or times when there is a failure or refusal by the Government to pay the plaintiff the pay or installments of pay which the statute requires and which plaintiff would have had if the Government had properly decided the matter under the statute. The arbitrary or erroneous decision may take place prior to the first refusal to grant pay or it may not take place finally until some time thereafter. Pay is frequently refused following a preliminary adverse decision from which appeals are permitted by law. If, after all decisions are made, the final result is contrary to law, then the denial of pay is wrongful back to the first installment of pay withheld, and if the plaintiff is wronged and entitled to the pay at all, he is entitled to all installments which fell due and were unpaid within the six years prior to the filing of the petition, plus any pay accruing and unpaid after the petition was filed up to the date judgment is entered.

Finally, it is noted that this case comes before the court on defendant's simple motion to dismiss on the sole ground that the petition is not timely. Such a motion to dismiss is in the nature of a plea of confession and avoidance, and, as such, for the purpose of testing the timeliness of the claim (which is the only issue before us), the moving party admits that the plaintiff has a valid and enforceable claim (here for disability retired pay). On such a motion de-

fendant admits the pay was due but seeks to avoid payment on the ground that the claim in this court comes too late. A holding that the petition is *timely* insofar as it seeks to recover pay due and unpaid during the six years prior to the petition, and not timely as to the prior balance, decides nothing on the *merits* of plaintiff's claim, *i.e.*, whether the action of the retiring board and the approval of the Secretary of War adverse to plaintiff, was erroneous or not.

APPENDIX B.

TITLE 28 UNITED STATES CODE.

"Section 1491. *Claims against United States generally.*

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort. June 25, 1948, c. 646, 62 Stat. 940."

"Section 2501. *Time for filing suit.*

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues."

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 746

SOLOMON S. LEVADI, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A, 11–18) is reported at 146 F. Supp. 455.

JURISDICTION

The judgment of the Court of Claims dismissing the petition was entered on December 5, 1956. The petition for a writ of certiorari was filed on February 2, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether a claim for disability retirement pay, filed in 1955 by a non-regular officer who was released from active duty in 1946 without entitlement to such pay, is barred by the six-year statute of limitations which governs the Court of Claims.

STATUTE INVOLVED

28 U. S. C. 2501 provides in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues.

STATEMENT

Petitioner, a former reserve officer of the Army of the United States, was released to inactive duty without entitlement to disability retirement pay in February, 1946. The instant suit for such pay was instituted in the Court of Claims in 1955. On motion to dismiss by the United States, the court below held (Pet. App. A, 11–18) the suit barred by the six-year statute of limitations. 28 U. S. C. 2501, *supra*.

ARGUMENT

The issue raised by the petition for certiorari in this case is precisely the same as that advanced in *Conlin* v. *United States*, pending on petition for a writ of certiorari, No. 721, this Term. For the reasons set forth in our brief in opposition in the *Conlin* case, we respectfully submit that the petition for certiorari herein should be denied.

J. LEE RANKIN,
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FEBRUARY 1957.

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